WONG SEE LENG v. C. SARASWATHY AMMAL.

[C. A. (Pretheroe Ag. C.J., Murray-Aynsley C.J. (S.) and Buhagiar J.) November 4, 1953]

[K. L. — F.M. Civil Appeal No. 15 of 1953]

Procedure — Pleadings — Principal object of Plaintiff adopting the facts alleged by defence. Land laws — Equity of redemption — Application to countries with registration of title.

In the pleadings the plaintiff (respondent) alleged breach of a partnership agreement regarding the development of the plaintiff's lands which had been transferred to the defendant (appellant) pursuant to the agreement. In his defence, the defendant denied the agreement, and alleged that the lands were transferred to him as security with the option to repurchase within a certain time. At the trial the plaintiff adopted the facts alleged in the defence and asked for judgment for an order for the retransfer of the said lands on the ground that the principle "once a mortgage always a mortgage" should be applied.

Held: (1) on the point of procedure, the step taken by the plaintiff in adopting facts alleged by the defence may be allowed if it is taken as soon as possible after the defence has been delivered and proper notice given to the other side. This would rule out the element of surprise and enable the defendant to plead facts which though not relevant to a defence in reply to the plaintiff's case as it stood originally might have been relevant on the new situation; (2) following **Haji Abdul Rahman v. Mohamed Hassan**(1), the English principles dealing with clogs on the equity of redemption do not apply to a system of registration of titles to land. The option given to the plaintiff to repurchase the land did not confer on her any interest in the land; she only acquired a contractual right and since time was made the essence of the contract she has forfeited that right.

Cases referred to:—

(1) *Haji Abdul Rahman v. Mohamed Hassan* (1917) A.C. 209; 1 F.M.S.L.R. 290.

(2) *Kreglinger v. New Pantagonia Co.* (1914) A.C. 25.

(3) *London Passenger Transport Board v. Moscrop* (1942) A.C. 332.

(4) *Budding v. Murdoch* (1875—1876) 1 Ch. D. 42.

(5) *Gajadhar v. Seth Maghraj* A.I.R. (1930) Nog. 8.

(6) *Appayya v. Ramireddi & Anor.* 11 Mad. 367.

(7) *Narainrao & Ors. v. Seth Hanumantram* A.I.R. (1930) Nog. 273.

(8) *Katsurbhai Mainibhai & Anor v. Harilal Dhayabhai & Anor.* A.I.R. (1930) Bom. 307.

(9) *Eshen Chunder Singh v. Shama Churn Bhutto* (1860) 11 Moo. I.A. 7.

(10) *Yaacob bin Lebai Jusoh v. Hamisah binti Saad* (1950) M.L.J. 255.

(11) *Hendry v De Cruz* (1949) M.L.J. Supp. 25.

(12) *Simpson v. Connolly* (1953) 2 All E.R. 474.

COURT OF APPEAL.

F. G. Charlesworth (*P. C. Au-Yong* with him) for the appellant (defendant).

Ng Ek Teong for the respondent (plaintiff).

Cur. Adv. Vult.

Murray-Aynsley, C.J. (S.) [with whom Pretheroe, Ag. C.J. agreed] : — In this appeal two matters arose for consideration. The first question was one of procedure. The pleading of the plaintiff alleged certain facts, the defendant's other facts. The plaintiff considered that the facts alleged by the defendant entitled her to a judgment. When the case came on for hearing counsel elected to adopt the facts alleged in the defence and ask for the judgment that would have been appropriate if those facts had been alleged by her in her statement of claim and proved at the trial. I think that this can be done if it is done in the proper way. I think that the step should be taken as soon as possible after the defence has been delivered and there should be proper notice to the other side. There should be no question of surprise, and if the matter can be decided in this way a great deal of time and expense can be saved, in particular it is not necessary to have witnesses in attendance. I think that for the purposes of section 152 of the Civil Procedure Code any fact alleged by the defence may be treated as an admission by the other side. In the present case the other side complained of surprise. It is always possible that facts may exist which would be irrelevant if pleaded in reply to the facts alleged by the plaintiff but which would have been relevant if the facts relied on by the plaintiff had been set out in a statement of claim. For this reason proper notice to the other side is essential. It has been stated that such facts exist in this case. In view of the opinion I have formed on the substantive question of law involved this is not a matter of great importance. The facts on which the plaintiff relied are to be found in para. 8 of the defence. The contention of the plaintiff was that on the basis of these facts the transaction was an informal mortgage and that the English doctrines concerning mortgages, in particular those dealing with clogs on an equity of redemption, should be applied. In my opinion, since the case of *Haji Abdul Rahman v. Mohamed Hassan*(1) it is an impossible position. That case decided as clearly as any case can decide anything that a transaction of this kind can in territories subject to the Land Code

amount only to a contract between the parties and nothing more. If it is a contract it is subject to the Contract Ordinance and there is nothing there or anywhere else that gives the Courts power to substitute something else for what was agreed between the parties. The contract alleged was an option with time the essence of the contract. That is a contract which parties are free to make if they choose, and people very frequently do make contracts of this kind. Courts have no power to extend the time for exercising the option. I will add that the whole doctrine concerning clogs on an equity of redemption when it has the effect of interfering with a bargain freely made between parties is anomalous and has been much criticised (see *Kreglinger v. New Pantagonia Co.*[2]), and I do not think that it should be applied in this country even if we were free to do so.

In my opinion judgment should have been given for the defendant in the Court below. The appeal should be allowed with costs and judgment entered for the appellant. Deposit to appellant.

Buhagiar, J. : — This is an appeal from a judgment of the High Court in which an order in the nature of a redemption decree as set out in the judgment was made against the defendant.

The defendant appealed against this judgment on two points, that is a point of procedure and a point of substantive law.

In the statement of plaint the plaintiff (respondent) alleged that there was a partnership agreement between her and the defendant (appellant) with the object of developing certain lands in Kuala Lumpur; these lands were transferred to the defendant so as to enable the scheme of development to be more conveniently carried out; all profits on the development of the said lands were to be shared in the proportion of two-thirds to the plaintiff and one-third to the defendant. The plaintiff alleged that the defendant committed a breach of the agreement and prayed for a declaration that she was no longer bound by the contract between herself and the defendant and for an order directing the defendant to retransfer the land to her.

In the statement of defence the defendant denied the agreement and alleged that the transfer to him of the said lands took place as security for money due by and for future advances to one Chellappah and that the said Chellappah was given the option in favour of the plaintiff to repurchase the said lands, such option to be exercised on or before the 31st December, 1950, time being of the essence of the contract; such option was not exercised within the agreed time.

At the hearing before the trial judge Counsel for the plaintiff submitted that no defence had been disclosed by the pleadings on the ground that the principle "once a mortgage always a mortgage" applied. The plaintiff then admitted absolutely the truth, in substance and in fact, of the defence and asked for judgment for an order for the retransfer of the said lands. Counsel for the defendant submitted that by admitting the facts in the defendant's pleadings the plaintiff was converting her suit into one of a different character. The learned trial judge held that the facts alleged by the defendant were "admissions" in the sense that the plaintiff can rely on them, if they assist her. Argument then followed on the point of substantive law on the facts as alleged by the defendant.

No issues were framed as provided by section 164 of the Civil Procedure Code (F.M.S. Cap. 7) and from the pleadings the issue between the parties appears to be "Did a contract exist between the parties?"

Now as stated in *Bullen and Leake's Precedents, of Pleadings*, 10th Edition page 1 :—

> "The principal objects of pleadings are firstly, to define the issues of fact and questions of law to be decided between the parties; secondly, to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial, and thirdly, to provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and constitute a permanent record of the questions raised in the action, and of issues decided therein, so as to prevent future litigation upon matters already adjudicated upon between the litigants."

By sub-rule 20 of 1949 Supreme Court Rule No. 1 (which corresponds to Order 28, rule 1 of the English S.C.R.) provision is made for the alteration or amendment of the pleadings for the purpose of determining the real questions in controversy between the parties. In the present case, the respondent by accepting the facts as set out in the defence and therefore abandoning the agreement on which she based her claim in her pleadings, was altering her cause of action; the appellant very reasonally complained of surprise and was placed in a position of not being able to plead facts (and Counsel for the appellant submitted at the hearing of the appeal that there were facts) which though not relevant to a defence in reply to the respondent's case as it stood originally might have been relevant on the new situation. As Lord Russell of Killowen said in *London Passenger Transport Board v. Moscrop*[3] at 347 :—

> "Any departure from the cause of action, or the relief claimed in the pleadings should be preceded, or, at all events accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be "deemed to be amended" or "treated as amended".

They should be amended in fact. No application was made by the respondent to amend her pleadings. If such application had been made, the Court might not, in view of the nature of the amendment, have allowed such amendment, but if it had the appellant would have been given the opportunity of putting in a further answer (See *Budding v. Murdoch*[4]).

Counsel for the respondent referred to several Indian cases to show that the plaintiff may rely on admissions made by the defendant to get the relief asked for in the plaint. He referred to *Gajadhar v. Seth Meghraj*[5], *Appayya v. Ramireddi & Anor.*[6], *Narainroa & Ors. v. Seth Hanumantram*[7] and *Kasturbhai Mainibhai & Anor. v. Hiralal Dhayabhai & Anor.*[8]. These cases, however are to be distinguished from the present one where the original cause of action in the plaint is completely altered and where a totally different line was adopted by the respondent at the hearing. Though pleadings in India are not to be construed as strictly as in England (see *Mulla on the Code of Civil Procedure*) still on this point their Lordships of the Privy Council in *Eshen Chunder Singh v. Shama Churn Bhutto*[9] held that neither party will be allowed to set up at the hearing an entirely new and inconsistent case; the plaintiff must be held to the state of facts alleged in his plaint or consistent therewith.

In default of any amendments to the pleadings, the action should, in my opinion, have been dismissed, without prejudice to a fresh suit being brought.

With regard to the appeal on the point of substantive law the question is whether on the facts as alleged by the appellant the respondent is entitled to a retransfer of the lands in question on the facts as alleged by the defendant. It was argued on behalf of the respondent that the transfer of the lands in question was by way of security and that being so the right to redeem remained, irrespective of whether or not the period during which the option to repurchase was to be exercised had expired. Counsel for the respondent relied on the decision of this Court in *Yaacob bin Lebai Jusoh v. Hamisah binti Saad*[10] and submitted that this Court was bound by this decision (*Hendry v. De Cruz*[11]). In my opinion, that case was decided against the authority of the decision of the Privy Council in *Haji Abdul Rahman v. Md. Hassan*[1]. It is true that in that case the question whether the equity of redemption was applicable to a case of a transfer by way of security was not directly in issue and that their Lordships found it unnecessary to decide whether the agreement in question was a *pactum de retrovendendo* or one of conveyance in security. But their Lordships expressed their view in no uncertain terms that the English rules of equity do not apply to a system of registration of titles to land; it is stated at page 216 :—

> "It seems to their Lordships that the learned judges have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase 'equity of redemption' is quite inapplicable in the circumstances."

In that case their Lordships held that the agreement in question was valueless as a transfer or burdening instrument but it was good as a contract. The whole ratio of the judgment delivered by Lord Dunedin is based on the registration statute itself in force in the former Federated Malay States and not on any peculiarities of the local law. That judgment is binding and affects all jurisdiction in territories within the Commonwealth which have, as in Malay States, a system of registration of title modelled on the well-known Torrens System of Australia and from the Courts of which the Judicial Committee of the Privy Council is the highest Court of Appeal. *Hogg* in the *Registration of Title to Land throughout the Empire* (1920 edition) in dealing with non-statutory securities (at page 289) explains the position, as a result of the Malay case, as follows :—

> "The creditor becomes the registered owner of the land, and the defeasance agreement is left unregistered. A transaction of this kind is not, having regard to the difference between ordinary conveyancing law and the system set up by registration of title, properly a mortgage, though often loosely referred to as such",

and at page 291 :—

> "In some circumstances the question of interest in land or contractual right is vital to the decision of the case, and where the right to a re-transfer has been held to be an actual interest in the land, such decisions must be taken to have been overruled . . . . . by the Privy Council judgment in the Malay case".

The option given to the respondent to repurchase the land did not confer on the respondent any interest in the land; she only acquired a contractual right; the legal position is similar to that which arose in *Simpson v. Connolly*[12] where there was an agreement to discharge a debt conditional on transfer of land. The respondent's right is governed by the law relating to contracts and the parties have chosen to make time of the essence of the contract: a term not prohibited by law. After the 31st December, 1950, the respondent's right became extinct.

For the above reasons I would allow the appeal on both points with costs and enter judgment for the appellant. Deposit to appellant.

Appeal allowed.

Solicitors for the appellant (defendant) : *Au-Yong Bros.*

Solicitors for the respondent (plaintiff) : *Braddell & Ramani.*